Supreme Court, U.S.
FILED
DEC 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-333

In the Supreme Court of the United States

OCTOBER TERM, 1990

LAMPF PLEVA LIPKIND PRUPIS & PETIGROW, PETITIONER

v.

JOHN GILBERTSON, ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF ARTHUR ANDERSEN & CO., COOPERS & LYBRAND, DELOITTE & TOUCHE, ERNST & YOUNG, KPMG PEAT MARWICK, AND PRICE WATERHOUSE AS AMICI CURIAE IN SUPPORT OF PETITIONER

Of Counsel:

JON N. EKDAHL
General Counsel
Arthur Andersen & Co.

HARRIS J. AMHOWITZ
General Counsel
Coopers & Lybrand

HOWARD J. KRONGARD
General Counsel
Deloitte & Touche

CARL D. LIGGIO
General Counsel
Ernst & Young

LEONARD P. NOVELLO
General Counsel
KPMG Peat Marwick

ELDON OLSON *
General Counsel
Price Waterhouse
1251 Avenue of the Americas
New York, New York 10020
(212) 819-4878

* *Counsel of Record*

December 5, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether implied private civil actions under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5), should be governed by the statute of limitations prescribed by the 73rd Congress for express causes of action created contemporaneously with the enactment of Section 10(b).

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT:	
CLAIMS UNDER SECTION 10(b) AND RULE 10b-5 SHOULD BE GOVERNED BY THE ONE YEAR/THREE YEAR STATUTE OF LIMITATIONS THAT THE 73rd CONGRESS PRESCRIBED FOR EXPRESS CAUSES OF ACTION IT CREATED CONTEMPORANEOUSLY WITH THE ENACTMENT OF SECTION 10(b)	5
A. The 73rd Congress Would Have Intended That Any Implied Cause Of Action Be Governed By The One Year/Three Year Limitations Rule	7
B. Application Of The Test Utilized In *DelCostello*, *Malley-Duff*, and *Reed* Confirms That Section 10(b) Claims Should Be Governed By The One Year/Three Year Rule	17
1. The Statute Of Limitations Applicable To A Section 10(b) Claim Should Not Vary Depending On The Factual Basis Of The Claim	17
2. Section 10(b) Claims Should Be Subject To A Uniform Federal Limitations Rule	19
3. The Causes Of Action Subject To The One Year/Three Year Rule Provide The Closest Analogy To Section 10(b) Claims	23
CONCLUSION	30

TABLE OF AUTHORITIES

Cases: Page

Affiliated Ute Citizens v. *United States*, 406 U.S. 128 (1972) 18
Agency Holding Corp. v. *Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987) ..... *passim*
American Trucking Ass'ns, Inc. v. *Smith*, 110 S. Ct. 2323 (1990) 29
Basic Inc. v. *Levinson*, 485 U.S. 224 (1988) 18, 19
Bateman Eichler, Hill Richards, Inc. v. *Berner*, 472 U.S. 299 (1985) 18
Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) ..... *passim*
Ceres Partners v. *GEL Associates*, No. 89-7666 (2d Cir. Nov. 8, 1990) ..... *passim*
Chardon v. *Fumero Soto*, 462 U.S. 650 (1983) 24
Chevron Oil Co. v. *Huson*, 404 U.S. 97 (1971) 29
Crane Co. v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), cert. denied, 400 U.S. 822 (1970) 10
In re Data Access Systems Securities Litigation, 843 F.2d 1537 (3d Cir.), cert. denied, 488 U.S. 849 (1988) ..... *passim*
Davis v. *Birr, Wilson & Co.*, 830 F.2d 1369 (9th Cir. 1988) 20
Davis v. *Michigan Dep't of Treasury*, 109 S. Ct. 1500 (1989) 11
DelCostello v. *International Brotherhood of Teamsters*, 462 U.S. 151 (1983) ..... *passim*
Herman & MacLean v. *Huddleston*, 459 U.S. 375 (1983) 9, 18
Kern County Land Co. v. *Occidental Petroleum Corp.*, 411 U.S. 582 (1973) 8
Kronfeld v. *Advest, Inc.*, 675 F. Supp. 1449 (S.D.N.Y. 1987) 21
McAllister v. *Magnolia Petroleum Co.*, 357 U.S. 221 (1958) 15
Norris v. *Wirtz*, 818 F.2d 1329 (7th Cir.), cert. denied, 484 U.S. 943 (1987) 2, 13, 22
Pennsylvania v. *Union Gas Co.*, 109 S. Ct. 2273 (1989) 11

TABLE OF AUTHORITIES—Continued

Page

Reed v. *United Transportation Union*, 488 U.S. 319 (1989) 5, 6, 17, 20
Reves v. *Ernst & Young*, 110 S. Ct. 945 (1990) 21
Santa Fe Industries, Inc. v. *Green*, 430 U.S. 462 (1977) 18
Schaefer v. *First National Bank*, 509 F.2d 1287 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976) 28
Short v. *Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990), petition for cert. pending, 59 U.S.L.W. 3354 (U.S. Sept. 26, 1990) (No. 90-526) ..... *passim*
In re Sioux, Ltd., Securities Litigation, 901 F.2d 51, vacated, 914 F.2d 61 (5th Cir. 1990) 22
Thompson v. *Thompson*, 484 U.S. 174 (1988) 5
United Parcel Service, Inc. v. *Mitchell*, 451 U.S. 56 (1981) 6
United States v. *Leon*, 468 U.S. 897 (1984) 29
United States v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989) 11
Wilson v. *Garcia*, 471 U.S. 261 (1985) ..... *passim*

Statutes and Regulations:

Securities Act of 1933,
15 U.S.C. § 77k 9
15 U.S.C. § 77*l* 9
15 U.S.C. § 77m 8
15 U.S.C. § 77aa (Schedule A) (25)-(27) 1
Securities Exchange Act of 1934,
15 U.S.C. § 78i(e) 8, 9
15 U.S.C. § 78j(b) ..... *passim*
15 U.S.C. § 78*l*(b)(1)(J)-(K) 1
15 U.S.C. § 78p(b) 8
15 U.S.C. § 78r 9
15 U.S.C. § 78r(c) 8
15 U.S.C. § 78t-1 23
15 U.S.C. § 78t-1(a) 23
15 U.S.C. § 78t-1(b)(1) & (2) 29

TABLE OF AUTHORITIES—Continued

	Page
15 U.S.C. § 78t-1(b)(4)	4, 23
15 U.S.C. § 78t-1(d)	25
15 U.S.C. § 78u-1(d)(5)	26
15 U.S.C. § 78aa	21
15 U.S.C. § 78cc(b)	8, 10
42 U.S.C. § 1983	18
Act of June 25, 1938, ch. 677, § 3, 52 Stat. 1076	10
17 C.F.R. § 240.10b-5	*passim*
Miscellaneous:	
ABA, *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 Bus. Law. 645 (1986)	21, 22
Block & Barton, *Statute of Limitations in Private Actions Under Section 10(b)—A Proposal for Achieving Uniformity*, 7 Sec. Reg. L.J. 374 (1980)	22
Bloomenthal, *Statutes of Limitations and the Securities Acts—Part II*, 7 Sec. & Fed. Corp. L. Rep. (Clark Boardman) 25 (Apr. 1985)	22
A. Bromberg, *Securities Law: Fraud: SEC Rule 10b-5* (1967)	22
78 Cong. Rec. 8198 (daily ed. May 7, 1934)	11-12, 13, 14
Definition of Insider Trading: Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs, 100th Cong., 1st Sess., pt. 1 (1987)	27
H.R. Conf. Rep. No. 1838, 73d Cong., 2d Sess. (1934)	14
H.R. Rep. No. 910, 100th Cong., 2d Sess. (1988)	26
The Insider Trading Act of 1983: Hearing on H.R. 559 Before the Subcomm. on Securities of the House Comm. on Banking, Housing, and Urban Affairs, 98th Cong., 2d Sess. (1984)	26
The Insider Trading Proscriptions Act of 1987: Hearing on S. 1380 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs, 100th Cong., 1st Sess. (1987)	27

TABLE OF AUTHORITIES—Continued

	Page
Israels, Book Review, 77 Yale L.J. 1585 (1968)	22
L. Loss, *Fundamentals of Securities Regulation* (2d ed. 1988)	21, 22
Ruder, *Civil Liability Under Rule 10b-5: Judicial Revision of Legislative Intent?*, 57 Nw. U.L. Rev. 627 (1962)	22
Stock Exchange Practices: Hearings on S. Res. 84, S. Res. 56, and S. Res. 97 Before the Sen. Comm. on Banking and Currency, 73d Cong., 1st Sess. (1934)	12, 13
Stock Exchange Regulation: Hearing on H.R. 7852 and H.R. 8720 Before the House Comm. on Interstate and Foreign Commerce, 73d Cong., 2d Sess. (1934)	12

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-333

LAMPF PLEVA LIPKIND PRUPIS & PETIGROW, PETITIONER

v.

JOHN GILBERTSON, ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF ARTHUR ANDERSEN & CO., COOPERS & LYBRAND, DELOITTE & TOUCHE, ERNST & YOUNG, KPMG PEAT MARWICK, AND PRICE WATERHOUSE AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI CURIAE

The amici curiae are professional firms engaged in the practice of accountancy. They are the six largest firms of independent accountants in the United States, reporting, collectively, on the financial statements of more than 90 percent of those companies whose securities are publicly traded in the United States. The amici, which are organized as partnerships, are collectively composed of nearly 9,000 partners and more than 78,000 other professional employees, and practice in some 600 offices throughout the United States.

The Securities Act of 1933 and the Securities Exchange Act of 1934 require all public companies whose securities are registered with the Securities and Exchange Commission to have their financial statements examined by independent accountants. See 15 U.S.C. § 77aa (Schedule A) (25)-(27); *id.* § 78*l*(b)(1)(J)-(K). When a registrant or its officers and directors are sued under the federal

securities laws, including Section 10(b), 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5, on the claim that statements issued by the registrant were fraudulent, the registrant's independent accountants frequently are joined as defendants on the basis of allegations that financial statements they audited contained material misstatements or omissions. Because amici's operations are nationwide in scope and amici are subject to suit throughout the country, the current disarray regarding the statute of limitations applicable to actions under Section 10(b) imposes a particularly heavy burden on amici. Amici therefore have a special interest in a uniform and appropriate statute of limitations for actions under Section 10(b) and believe that their views may be of assistance to the Court's consideration of this case.

SUMMARY OF ARGUMENT

The disagreement among the courts of appeals regarding the statute of limitations applicable to Section 10(b) claims creates tremendous uncertainty, leads to disparities in the rights of parties litigating the identical federal claim in different states, promotes forum shopping by plaintiffs, and wastes the resources of litigants and of the courts. "Both the bar and scholars * * * have pleaded, with a unanimity rare in the law, for help." *Norris* v. *Wirtz*, 818 F.2d 1329, 1332 (7th Cir.), cert. denied, 484 U.S. 943 (1987). The present state of affairs is a consequence of the failure to apply to Section 10(b) claims the express limitations rule that Congress prescribed for private actions under the securities laws like the action implied under Section 10(b). This Court should hold that Section 10(b) claims are subject to that statute of limitations, which Congress adopted along with Section 10(b) in the Securities Exchange Act of 1934: suit must be brought within one year after discovery of the facts constituting the violation but no later than three years after the transaction in question.

A. Where Congress intended that a particular limitations rule apply to a federal cause of action, that, of course, is the rule that should govern. Here, there can be no doubt that the 73rd Congress—the Congress that enacted Section 10(b)—would have intended to subject any private action implied under Section 10(b) to the one year/three year rule. That is the statute of limitations that applies to every express private action requiring proof of culpability that the 73rd Congress created in the 1934 Act and in the Securities Act of 1933. And the claims that may be brought under those express actions are closely related to the claims that historically have been brought under Section 10(b). Indeed, the very same claim frequently is brought under both Section 10(b) and one or more of these express causes of action. Congress plainly would have subjected all of these claims to the same limitations rule if it had anticipated that the courts would imply a private right of action under Section 10(b).

Moreover, the legislative history reveals that Congress in 1934 carefully considered the appropriate limitations rule. Its adoption of the one year/three year rule was not tied to the specific contours of the express causes of action, but rather reflects a generic determination regarding the appropriate statute of limitations for private actions grounded in claims of securities fraud. That judgment obviously encompasses the action subsequently implied under Section 10(b).

B. Even if the Court chooses to analyze the question by determining which limitations rule supplies the "close[st] analogy" to Section 10(b) (*DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151, 172 (1983)), the one year/three year rule is the obvious choice. First, it is clear that the statute of limitations rule applicable to a claim under Section 10(b) should not vary depending on the particular facts of the claim. The cause of action encompasses a variety of claims that skillful lawyers can characterize in different ways. In order to avoid uncertainty and wasteful litigation, all Section 10(b) claims should be treated the same for statute of limitations purposes.

Second, that statute of limitations should be drawn from federal rather than state law. No state law analogy comes close to capturing all facets of the Section 10(b) action, while the express causes of action under the federal securities laws supply extremely apt analogies. Moreover, the interstate nature of the transactions covered by Section 10(b) and the goals of preventing forum shopping and treating similarly situated parties alike weigh strongly in favor of a uniform federal rule. Plaintiffs now may obtain the benefit of a favorable statute of limitations by choosing a particular forum. And, "if two suits are brought in different states seeking damages for a single act in violation of the federal securities laws, one suit may be barred while the other is not." *Ceres Partners* v. *GEL Associates*, No. 89-7666, slip op. 7253 (2d Cir. Nov. 8, 1990).

Third, the federal limitations rule should be the one year/three year rule adopted by Congress for express causes of action enacted at the same time as Section 10(b), not (as the Securities and Exchange Commission has recently argued) the five year statute that Congress adopted 54 years later to apply only to the narrow category of insider trading claims. See Section 20A(b)(4) of the 1934 Act, 15 U.S.C. § 78t-1(b)(4). Section 10(b) is much more analogous to the actions covered by the one year/three year rule than to the specific and narrowly-drawn remedy set forth in Section 20A. And the legislative history of Section 20A makes clear that the five year statute was designed specifically for the insider trading context; indeed, Congress did not alter the limitations rule for the other express remedies. The one year/three year rule, by contrast, was selected by Congress as a general statute of limitations for securities fraud claims. Because it is "the statute *designed for* the kind of conduct about which * * * most * * * 10b-5 plaintiffs complain," the one year/three year rule should govern Section 10(b) claims. *Short* v. *Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1392 (7th Cir. 1990) (emphasis in original), petition for cert. pending, 59 U.S.L.W. 3354 (U.S. Sept. 26, 1990) (No. 90-526).

ARGUMENT

CLAIMS UNDER SECTION 10(b) AND RULE 10b-5 SHOULD BE GOVERNED BY THE ONE YEAR/THREE YEAR STATUTE OF LIMITATIONS THAT THE 73rd CONGRESS PRESCRIBED FOR EXPRESS CAUSES OF ACTION IT CREATED CONTEMPORANEOUSLY WITH THE ENACTMENT OF SECTION 10(b)

Selecting the limitations period applicable to a cause of action created by a federal statute is an inquiry that turns entirely on the intent of the Congress that adopted the statute. The fact that a cause of action is implied rather than express does not shift the focus of the inquiry away from congressional intent. Implied actions are created by Congress, not the courts: a court's conclusion that it should recognize an implied cause of action rests on the court's determination that Congress intended to create that cause of action. See *Thompson* v. *Thompson*, 484 U.S. 174, 179 (1988). Just as congressional intent controls the question whether such a cause of action should be implied in the first place, it controls questions regarding the scope of that action, such as the governing statute of limitations.

When Congress fails to supply an express statute of limitations for a cause of action, and there is no direct evidence concerning the limitations rule that Congress intended to apply, this Court has " 'generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law.' " *Reed* v. *United Transportation Union*, 488 U.S. 319, 323 (1989) (quoting *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983)). But this approach to determining congressional intent is not absolute. "[O]n the assumption that Congress would not choose 'to adopt state [limitations] rules at odds with the purpose or operation of federal substantive law,' [the Court has] recognized a closely circumscribed exception

to the general rule that statutes of limitations are to be borrowed from state law." *Reed*, 488 U.S. at 324 (citation omitted). State limitations rules will not apply "when a rule from elsewhere in *federal* law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking." *DelCostello*, 462 U.S. at 172 (emphasis added).

Of course, the general rule favoring application of the "most closely analogous" state statute of limitations—and the accompanying standard for determining when that practice should be discarded—serve only as "a sort of fallback rule of thumb" to fill the gap resulting from the absence of direct evidence of the intent of the Congress that created the cause of action. *DelCostello*, 462 U.S. at 158 n.12; see also *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U.S. 143, 147 (1987). There is no need for a court to determine which statute of limitations is "most closely analogous"—and undertake the weighing of "federal policies" and "the practicalities of litigation" necessary to make that judgment—if Congress itself identified the appropriate limitations rule. Indeed, rigid adherence to the practice of borrowing from state law could frustrate congressional intent by imposing a statute of limitations different from the one Congress would have intended to apply.[1]

[1] Furthermore, where the cause of action is implied rather than express and the statute contains an analogous express cause of action bounded by an express limitations period, there is considerably less justification for inferring from congressional silence an inclination to adopt state law limitations rules. *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 68 n.4 (1981) (Stewart, J., concurring in the judgment); see also *DelCostello*, 462 U.S. at 159 n.12 (reserving question). Because Congress omitted from the statute all reference to the cause of action, its silence regarding the appropriate statute of limitations is not probative. Indeed, the most logical assumption, especially where the implied and express causes of action are closely related, is that Congress would have intended the express statute of limitations to extend to any implied cause of action as well.

There is no need for recourse to the general rule and related inquiries in this case because Congress's intent regarding the appropriate statute of limitations for Section 10(b) claims is clear. Examination of the statute's language, structure, and legislative history establishes that the 73rd Congress, which enacted Section 10(b) in 1934, would have intended that any private action implied under Section 10(b) be governed by the statute of limitations that it prescribed for virtually all of the express causes of action enacted in the Securities Exchange Act of 1934 and the Securities Act of 1933. "It would indeed be anomalous to impute to Congress an intention to expand * * * a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 736 (1975). Accordingly, that is the limitations rule that should be recognized by this Court.

Even if the Court were to apply the analysis it utilizes where there is no direct evidence of congressional intent, moreover, it would reach the same conclusion. The Section 10(b) implied action is unlike any claim under state law, and most closely resembles the express causes of action subject to the limitations rule adopted in the 1934 Act. The relevant policies also weigh strongly in favor of that limitations rule.

A. The 73rd Congress Would Have Intended That Any Implied Cause Of Action Be Governed By The One Year/Three Year Limitations Rule.

The language and legislative history of the 1934 Act leave no doubt regarding the statute of limitations that the 73rd Congress would have applied to the cause of action implied under Section 10(b). The express private causes of action created by the 73rd Congress in the 1934 Act—and the express private causes of action in the 1933 Act—are accompanied by express statutes of limitations. For actions like the one implied under Section 10(b) that require proof of culpability, Congress established the same limitations period: suit must be brought within one

year after discovery of the facts constituting the violation but no later than three years after the transaction in question. 15 U.S.C. §§ 77m, 78i(e), 78r(c); see also *id.* § 78cc(b). That is the rule that should apply to actions under Section 10(b).[2]

First, Section 10(b) claims are closely related—indeed, frequently identical—to the claims that may be brought under the express causes of action. Section 10(b) bars the use "in connection with the purchase or sale of any security * * * [of] any manipulative or deceptive device or contrivance" in contravention of rules adopted by the Securities and Exchange Commission. Rule 10b-5 promulgated thereunder implements this prohibition by forbidding the use in connection with the purchase or sale of securities of (1) "any device, scheme, or artifice to defraud"; (2) "any untrue statement of a material fact or [failure] to state a material fact necessary in order to make the statements made * * * not misleading"; and (3) "any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." The focus of the statute and the rule is thus the

[2] The only express cause of action in the 1934 Act with a different limitations provision is Section 16(b), 15 U.S.C. § 78p(b), which provides for recovery of profits from "short-swing" transactions in company stock (purchases and sales within a six-month period) by corporate insiders. That cause of action, which is governed by a two-year statute of limitations, differs substantially from Section 10(b) and the other express causes of action under the securities laws. Section 16(b) "is not a disclosure section"; "[n]o proof is required of any misleading representation or omission, or of any statement at all; indeed, not even the most complete disclosure is a defense against recovery of short-swing profits." *Ceres Partners* v. *GEL Associates*, No. 89-7666, slip op. 7270 (2d Cir. Nov. 8, 1990). Section 16(b) is a strict liability provision. *Kern County Land Co.* v. *Occidental Petroleum Corp.*, 411 U.S. 582, 595 (1973). Because Section 16(b) establishes a prophylactic rule for which proof of culpability is not required, courts have agreed that its somewhat shorter statute of limitations is not relevant in determining the proper limitations period for Section 10(b) claims. *Ceres Partners*, slip op. 7270-7271; *In re Data Access Systems Securities Litigation*, 843 F.2d 1537, 1546 (3d Cir.) (en banc), cert. denied, 488 U.S. 849 (1988).

use of deception or any other fraudulent device in connection with securities transactions.

The express causes of action target precisely the same type of conduct. Indeed, claims that may be asserted under these provisions frequently are cast as violations of Section 10(b). For example, Section 9(e) of the 1934 Act, 15 U.S.C. § 78i(e), provides a cause of action for manipulative marketing of securities, including inducing transactions by means of false or misleading statements. The very same conduct may, of course, give rise to a claim under Section 10(b). *Ceres Partners* v. *GEL Associates*, No. 89-7666, slip op. 7267-7268 (2d Cir. Nov. 8, 1990). Section 18 of the 1934 Act, 15 U.S.C. § 78r, allows a purchaser of securities to recover for reliance on false or misleading statements in documents filed with the Commission. "Such a purchaser could instead pursue this type of claim under § 10(b)." *Ceres Partners*, slip op. 7267.

Similarly, Section 11 of the 1933 Act, 15 U.S.C. § 77k, imposes liability for false statements in a registration statement filed with the Commission. Again, where a plaintiff can allege the other elements of a Section 10(b) claim, including trading in reliance on such false information and scienter, he may assert a claim under the latter provision as well. *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 380-387 (1983) (discussing overlap between the two provisions).

Finally, Section 12(2) of the 1933 Act, 15 U.S.C. § 77*l*, provides a remedy for purchasers of securities damaged by false statements made by persons selling the securities. Although Section 10(b) is somewhat broader in scope than Section 12(2), there is a close resemblance in the type of conduct prohibited by the two provisions. As one court has observed, Section 12(2) "describes the offense to which Rule 10b-5 is applied: fraudulent misstatements or omissions in connection with the purchase or sale of securities." *Short* v. *Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1390 (7th Cir. 1990), petition for cert.

pending, 59 U.S.L.W. 3354 (U.S. Sept. 26, 1990) (No. 90-526).[3]

Beyond this striking similarity in the conduct covered by the express causes of action and the Section 10(b) implied action, an additional factor—common purpose—also supports the conclusion that the 73rd Congress would have applied an identical limitations period. "Both section 10(b) and its companion provisions * * * are aimed at the same objectives * * *: 'to "provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes."'" *In re Data Access Systems Securities Litigation*, 843 F.2d 1537, 1548 (3d Cir.) (en banc), cert. denied, 488 U.S. 849 (1988) (quoting *Blue Chip Stamps*, 421 U.S. at 728). "All," moreover, "aim to compensate the same type of injury. All are designed to fill a void in the common law and to create remedies that would be uniform throughout our nation's commercial universe." *Data Access*, 843 F.2d at 1548-1549. Accord, *Ceres Partners*, slip op. 7266-7267, 7270.[4]

---

[3] Section 29(b) of the 1934 Act, 15 U.S.C. § 78cc(b), provides a cause of action for rescission of certain contracts that violate the Act. It was originally enacted without an express limitations provision but Congress in 1938 amended the provision to impose the one year/three year rule. See Act of June 25, 1938, ch. 677, § 3, 52 Stat. 1076. Because Section 29(b) provides a remedy for violations of any of the substantive provisions of the statute, it plainly overlaps to a considerable degree with the claims that may be asserted under Section 10(b).

[4] The express causes of action cannot be distinguished on the ground that they require a lesser showing of culpability. Although negligence is sufficient for the imposition of liability under some of the express causes of action, proof of scienter is required to prevail under Section 9(e). See, *e.g.*, *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787, 794 (2d Cir. 1969), cert. denied, 400 U.S. 822 (1970). Because Congress did not distinguish among the express causes of action by reference to level of culpability, it would not have distinguished Section 10(b) on the basis of the latter provision's scienter requirement. Indeed, as we discuss below, the legislative history makes clear that Congress specifically intended the one year/three year rule to apply to fraud claims.

In view of the similarity in the types of conduct targeted by the express actions and Section 10(b), the provisions' often-parallel language, and their identical purpose, can there be any doubt what the 73rd Congress would have done if it had anticipated in 1934 that an action would be implied under Section 10(b)? That Congress obviously would have subjected Section 10(b) claims to the limitations rule it applied to the closely-related express actions.

Where, as here, the proper interpretation of a statute is clear from its language and structure, that is where the inquiry should end. *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-241 (1989); *Davis* v. *Michigan Dep't of Treasury*, 109 S. Ct. 1500, 1504 n.3 (1989); *Pennsylvania* v. *Union Gas Co.*, 109 S. Ct. 2273, 2296 (1989) (Scalia, J., concurring in part and dissenting in part). Even if recourse to the legislative history of the 1934 Act were appropriate, moreover, the outcome would not change because the legislative history confirms that the 73rd Congress's rationale for adopting the one year/three year limitations rule applies with equal force to Section 10(b) claims.

Congress in 1934 devoted considerable attention to fixing the appropriate statute of limitations. The legislative history reveals that Congress's decision rested on two key determinations. First, too long a period for filing suit would allow a potential plaintiff to wait and see how the security did in the market, thereby speculating at the risk of the alleged wrongdoer:

> [I]f a man buys something today and discovers tomorrow that some mistake has been made and perhaps he has a ground for suit because of fraud, under the terms of the bill he must bring his suit within 1 year. But suppose he thinks, "Perhaps the

> bonds I have bought will go up. I will not bring suit until I find out about that. If the bonds go down then I will have the option of suing these people and trying to recover. If the bonds go up, then I will not sue because I can get a profit on them."

78 Cong. Rec. 8199 (daily ed. May 7, 1934) (statement of Sen. Kean). The one year rule was specifically designed to prevent such speculation.[5]

Congress expressly concluded—after heated debate (78 Cong. Rec. 8198-8203 (daily ed. May 7, 1934))—that one year from discovery provided sufficient time for potential plaintiffs to assert claims grounded in fraud:

> [T]he thought was that a man ought not to delay suit more than 1 year after he discovers the fraud. If he has been injured and finds that he has been injured, he ought to bring his action within a reasonable time, and we fix that time at 1 year.

Id. at 8198 (statement of Sen. Fletcher) (commenting on amendment to reduce the period for filing suit from two

[5] Testimony during the hearings emphasized that the danger of speculation by potential plaintiffs would be enhanced by a longer limitations period. See *Stock Exchange Practices: Hearings on S. Res. 84, S. Res. 56, and S. Res. 97 Before the Sen. Comm. on Banking and Currency*, 73d Cong., 1st Sess. 6910 (1934) (statement of president of the Association of Stock Exchange Firms); *Stock Exchange Regulation: Hearing on H.R. 7852 and H.R. 8720 Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 303, 307 (1934) (same).

The Seventh Circuit has more recently reaffirmed the danger of a lengthy limitations period:

> Prices of securities are volatile. If suit may be postponed indefinitely on equitable grounds, then investors may gamble with other people's money. An investor * * * may sell her shares for a price certain. If the firm does poorly, she keeps the money; if it does well, she sues and asks for the increase in value. Congress chose one year after discovery, and a cap of two additional years on tolling principles, in order to curtail the extent to which the securities laws permit recoveries based on the wisdom given by hindsight.

Short, 908 F.2d at 1392.

years to one year). Several Senators objected on the ground that one year was too short a time in which to require potential plaintiffs to file suit. *Id.* at 8199, 8200-8201 (remarks of Sen. Norris); *id.* at 8200 (remarks of Sen. Adams). But the one-year rule was ultimately adopted. See *id.* at 8203.

Second, "Congress included statutes of repose because of fear that lingering liabilities would disrupt normal business and facilitate false claims." *Norris* v. *Wirtz*, 818 F.2d 1329, 1332 (7th Cir.), cert. denied, 484 U.S. 943 (1987); see also *Data Access*, 843 F.2d at 1546. The outside time limit on the filing of lawsuits was deemed necessary both to prevent speculation by potential plaintiffs and to provide finality to business transactions. Congress concluded that even a person who could be sued for fraud "ought to feel safe at some reasonable time that he will not be disturbed." 78 Cong. Rec. 8198 (daily ed. May 7, 1934) (remarks of Sen. Fletcher). Congress also feared that permitting plaintiffs to bring suit long after the underlying violation would deter individuals from serving on boards of directors. "Looking at the matter from the standpoint of the director of a corporation, one [consideration] was that we should bring to an end his fear, or the fear of his estate, of a suit." *Id.* at 8200 (remarks of Sen. Byrnes).

One Senator stated that allowing suit within several years of the discovery of the fraud, without an outside limit on the time for filing suit, would give rise to "blackmail." "They discover it after the market has gone down, and after something has happened, and they are looking for mistakes, and years afterwards there is a liability that carries to your grandchildren and great-grandchildren." *Stock Exchange Practices: Hearings on S. Res. 84, S. Res. 56, and S. Res. 97 Before the Sen. Comm. on Banking and Currency*, 73d Cong., 1st Sess. 6565 (1934) (remarks of Sen. Kean).

The conference committee modified the Senate provision, which had fixed the limitations period at one year from discovery but no later than five years after the violation, adopting the one year/three year provision embodied in the final bill. H.R. Conf. Rep. No. 1838, 73d Cong., 2d Sess. 32, 36, 42 (1934). Significantly, the 1934 Act also amended the 1933 Act's limitations provision, substituting the one year/three year rule for the two year/ten year provision originally included in that statute. H.R. Conf. Rep. No. 1838, *supra*, at 42. The one year/three year rule thus embodied Congress's considered judgment concerning the appropriate statute of limitations for virtually all private actions under the 1933 and 1934 Acts.[6]

The debate on the statute of limitations issue—and the essentially universal application of the one year/three year rule—leaves no doubt that Congress would have applied the same limitations rule to actions under Section 10(b). Congress's view of the question did not turn on the specifics of the particular cause of action. Rather, Congress made a generic determination regarding the appropriate statute of limitations for claims under the securities laws, after a debate that centered on the proper rule for "fraud" claims. See generally 78 Cong. Rec. 8198-8201 (daily ed. May 7, 1934). That determination plainly encompasses Section 10(b).

Indeed, applying a different statute of limitations would undercut the policy choice that Congress made with respect to the express causes of action. Because claims brought under the express causes of action frequently may be recharacterized as claims under Section 10(b), a longer limitations period for Section 10(b) would allow

[6] Significantly, Congress in 1938 applied the one year/three year rule to claims under Section 29(b). See page 10, note 3, *supra*. Although Congress did not record the reasons for this action, the most logical deduction is that Congress viewed that limitations rule as the one generally appropriate for private actions under the securities laws.

a plaintiff to circumvent the one year/three year rule by bringing his claim under Section 10(b). The Congress that so carefully chose the one year/three year rule plainly would have prevented that result by applying the same limitations rule to Section 10(b) claims. That is how this Court should construe the statute. *Blue Chip Stamps*, 421 U.S. at 736 (refusing to attribute to Congress the intent to expand Section 10(b) beyond the bounds of the analogous express causes of action); cf. *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 226 (1958) (holding that the express statute of limitations governing a Jones Act claim should extend to the parallel admiralty law claim because applying a different rule would undercut the congressional judgment reflected in the express limitations provision).

In sum, the 73rd Congress plainly adopted the one year/three year rule as a general limitations rule for private actions under the provisions of the federal securities laws that provide remedies for "fraud." In these circumstances, "it would seem bizarre if not anomalous to go beyond the express statutes of limitations contained in provisions of the 1934 Act" to find the limitations provision applicable to Section 10(b) actions. *Data Access*, 843 F.2d at 1549. The only logical conclusion is that the one year/three year statute of limitations governs those actions.

The Solicitor General has suggested that the intent of the 73rd Congress is irrelevant in determining the proper limitations period because Congress did not contemplate an implied cause of action under Section 10(b) and could not have foreseen the growth in the scope of that cause of action. U.S. Am. Br. at 17-18, *Lebman* v. *Aktiebolaget Electrolux*, cert. denied, 109 S. Ct. 3214 (1989). But the fact that the courts may have erred in recognizing the implied Section 10(b) action in the absence of any evidence that Congress intended that result (see page 5, *supra*) provides no justification for compounding

the damage by ignoring the evident intent of the 73rd Congress in ascertaining the appropriate statute of limitations. Rather, that fact provides an additional reason for hewing to clear congressional intent with respect to the scope of the implied action.

Thus, the Court has looked to congressional intent, as expressed in the words of the statute and the legislative history, in shaping the Section 10(b) action. *Blue Chip Stamps*, 421 U.S. at 731-736; see also *id.* at 755 (Powell, J., concurring) ("emphasiz[ing] the significance of the texts of the Acts of 1933 and 1934"). The Court did state in *Blue Chip Stamps* that Congress had not "foreordained the present state of the law with respect to Rule 10b-5"; the Court therefore weighed several "policy considerations" in determining how to "flesh out the portions of the law with respect to which neither the congressional enactment nor the administrative regulations offer conclusive guidance." *Id.* at 737. Here, however, as we have discussed, the congressional enactment *does* offer conclusive guidance. The Court should vindicate Congress's intent by holding that Section 10(b) actions are governed by the one year/three year rule.[7]

---

[7] Congress's inaction in the face of the lower courts' failure to apply the one year/three year rule does not somehow erase the intent of the 73rd Congress, as the Solicitor General suggested in his *Lebman* brief (at 18 n.22). This Court in *Malley-Duff* held a federal limitations period applicable to civil RICO actions despite congressional inaction in the face of adoption of various state limitations periods by the lower courts. Indeed, the Court rejected the argument for congressional ratification in *Malley-Duff* even though Congress had specifically considered amendments to RICO that would have established a federal limitations period. 483 U.S. at 154-155.

B. Application Of The Test Utilized In *DelCostello*, *Malley-Duff*, And *Reed* Confirms That Section 10(b) Claims Should Be Governed By The One Year/Three Year Rule.

In view of Congress's clear intent to adopt the one year/three year rule as an across-the-board statute of limitations for securities law claims, there is no need for recourse to the test that applies when Congress has not spoken regarding the governing limitations rule. See pages 5-6, *supra*. Should the Court nonetheless find it appropriate to undertake the latter inquiry, the Court should first consider whether all claims under Section 10(b) should be characterized the same way or the limitations rule should differ depending on the nature of the claim. Next, the Court should identify the cause of action most analogous to Section 10(b). Because the express actions subject to the one year/three year statute of limitations bear a strikingly close resemblance to suits under Section 10(b), that limitations rule should apply to Section 10(b) actions.

1. *The Statute Of Limitations Applicable To A Section 10(b) Claim Should Not Vary Depending On The Factual Basis Of The Claim.*

The initial inquiry in determining the appropriate statute of limitations is "whether all claims arising out of the federal statute 'should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case.'" *Malley-Duff*, 483 U.S. at 147 (quoting *Wilson* v. *Garcia*, 471 U.S. 261, 268 (1985)); see also *Reed*, 488 U.S. at 325. This Court has found in a variety of statutory contexts that a uniform limitations rule is necessary to avoid uncertainty and wasteful litigation. See *Reed*, 488 U.S. at 326; *Malley-Duff*, 483 U.S. at 149-150; *Wilson*, 471 U.S. at 275. That determination is also true with respect to Section 10(b).

Section 10(b), like the RICO statute and 42 U.S.C. § 1983, "encompass[es] numerous and diverse topics and subtopics." *Wilson*, 471 U.S. at 273; see also *Malley-Duff*, 483 U.S. at 149-150. Claims may be brought by a purchaser or seller of securities against "*any* person" who engages in conduct prohibited by Section 10(b). Defendants may include securities issuers, officers and directors, underwriters, accountants, lawyers, traders in the securities markets, and broker-dealers. Claims may be premised on misrepresentations in documents filed with the Commission, false public statements by the issuer, manipulation of securities markets, trading on inside information, and overreaching by broker-dealers.[8] The statute truly "embrace[s] a galaxy of actions." *Data Access*, 843 F.2d at 1543.

Moreover, each of these claims may be characterized in different ways; for example, as fraud, breach of fiduciary duty, breach of contract, or a violation of a state statute such as a blue sky law. "If the choice of the statute of limitations were to depend upon the particular facts or the precise legal theory of each claim, counsel could almost always argue, with considerable force, that two or more periods of limitations should apply to each [Section 10(b)] claim." *Wilson*, 471 U.S. at 274.

The resulting uncertainty about the applicable statute of limitations has real adverse consequences. Plaintiffs may be misled as to the deadline for filing their claims and defendants " 'cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose.' " *Malley-Duff*, 483 U.S. at 150 (quoting *Wilson*, 471 U.S. at 275 n.34). In addition, resources are diverted into unnecessary collateral litigation over the

---

[8] See, *e.g.*, *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988); *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299 (1985); *Herman & MacLean, supra; Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 476-477 (1977); *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972).

proper limitations rule. Accordingly, there can be no doubt that for Section 10(b) a "uniform statute of limitations is required to avoid intolerable 'uncertainty and time-consuming litigation.' " *Malley-Duff*, 483 U.S. at 150 (quoting *Wilson*, 471 U.S. at 272). See also *Data Access*, 843 F.2d at 1540-1541, 1543-1544 (outlining complexity of "matching" particular types of Section 10(b) claims with different statutes of limitations and rejecting that approach in favor of a single limitations rule).

2. *Section 10(b) Claims Should Be Subject To A Uniform Federal Limitations Rule.*

The uniform limitations period for Section 10(b) claims should be drawn from federal rather than state law. First, as we have discussed (see pages 8-10, *supra*), federal securities law contains statutory provisions that closely resemble Section 10(b). The state law analogies, by contrast, do not adequately capture the multifaceted nature of Section 10(b). For example, this Court has recognized that "[a]ctions under Rule 10b-5 are distinct from common-law deceit and misrepresentation claims." *Basic Inc.* v. *Levinson*, 485 U.S. 224, 244 n.22 (1988). See also *Blue Chip Stamps*, 421 U.S. at 744-745 ("the typical fact situation in which the classic tort of misrepresentation and deceit evolved was light years away from the world of commercial transactions to which Rule 10b-5 is applicable"). Common law fraud actions thus are not sufficiently analogous to Section 10(b) actions to justify the borrowing of state statutes of limitations applicable to fraud claims. *Ceres Partners*, slip op. 7264-7265; *Data Access*, 843 F.2d at 1544-1545.

Analogies to other state law claims are similarly defective. See *Data Access*, 843 F.2d at 1543-1544, 1549 (flaws in analogy to state blue sky laws). The variety of different state law analogies adopted by the courts of appeals—including fraud actions, blue sky claims, and

personal injury actions[9]—itself demonstrates that no single state law action is truly analogous to Section 10(b) claims.

Second, Section 10(b) actions, like civil actions under RICO, "involve interstate transactions." *Malley-Duff*, 483 U.S. at 153. Indeed, a nexus with interstate commerce is a necessary prerequisite for claims under RICO and Section 10(b) alike. Accordingly, the "multistate nature of" Section 10(b) claims strongly "indicates the desirability of a uniform federal statute of limitations." *Malley-Duff*, 483 U.S. at 154. See also *Ceres Partners*, slip op. 7250 ("federal securities regulation is inherently national in scope and in need of uniform rules").[10]

Parties to a single transaction frequently are scattered across the country. In the interest of fundamental fairness and certainty for all concerned, a "broker in Phoenix, an issuer in San Francisco, a purchaser in Montana, an accountant in Portland, and a lawyer in Honolulu should be subject to the same statute of limitations for actions based on Section 10(b) or Rule 10b-5." *Davis* v. *Birr, Wilson & Co.*, 839 F.2d 1369, 1375 (9th Cir. 1988) (Aldisert, J., concurring); accord, *Data Access*, 843 F.2d at 1549. Otherwise, "if two suits are brought in different states seeking damages for a single act in violation of the federal securities laws, one suit may be barred

---

[9] See U.S. Am Br. App., *Lebman* v. *Aktiebolaget Electrolux*, *supra*.

[10] "This is in marked contrast to the typical § 1983 suit, in which there need not be any nexus to interstate commerce, and which most commonly involves a dispute wholly within one State." *Malley-Duff*, 483 U.S. at 154. See *Wilson*, *supra* (applying state personal injury limitations statutes for § 1983 claims); *Reed*, 488 U.S. at 325-327 (applying state personal injury statute of limitations to claim that union violated officer's free speech rights under the Labor-Management Reporting and Disclosure Act, relying on close similarity between the LMRDA and § 1983 actions).

while the other is not." *Ceres Partners*, slip op. 7253.[11] There is simply no reason that the viability of federal law claims asserted by identically-situated plaintiffs should turn upon the state in which the lawsuits are filed or the plaintiffs reside. ABA, *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 Bus. Law. 645, 647 (1986) ("*ABA Report*"). As this Court recently observed in *Reves* v. *Ernst & Young*, 110 S. Ct. 945, 954 (1990), Congress did not "intend[] the Securities Acts to apply differently to the same transactions depending on the accident of which State's law happens to apply."

Third, there are compelling practical justifications for applying a uniform federal limitations rule to Section 10(b) claims. "[T]he use of state statutes * * * present[s] the danger of forum shopping." *Malley-Duff*, 483 U.S. at 154; L. Loss, *Fundamentals of Securities Regulation* 993 (2d ed. 1988). Around the country, statutes of limitations for claims under Section 10(b) vary widely, ranging from as little as one year in Maryland to as much as six years in Michigan. *ABA Report* at 663, 664. With so wide a disparity, the temptation to shop for the most generous limitations period is overwhelming, "especially under a statute like the 1934 Act [see 15 U.S.C. § 78aa] that provides for a broad choice of venue and nationwide service of process." Loss, *supra*, at 993.

In addition, precious judicial resources are wasted determining the appropriate statute of limitations. *ABA*

---

[11] The Second Circuit cited one Section 10(b) action in which *twenty-six* separate statutes of limitations had been applied. *Ceres Partners*, slip op. 7253 (citing *Kronfeld* v. *Advest, Inc.*, 675 F. Supp. 1449, 1457-1458 & n.21 (S.D.N.Y. 1987)). "Indeed, there is no theoretical reason that residents of all 50 states could not be joined in a single suit or represented in a class action, with the result that more than 50 not-particularly-appropriate state statutes could provide the sources for determining whether the respective claims of otherwise identically situated plaintiffs were time-barred." *Ceres Partners*, slip op. 7266.

Report at 647; Loss, *supra*, at 994. The uncertainty and unpredictability caused by application of federal tolling rules to state statutes of limitations, which may incorporate tolling rules of their own, exacerbate this problem. "Deciding which features of state periods of limitation to adopt for which federal statutes wastes untold hours. Never has the process been more enervating than in securities law. There are many potentially analogous state statutes, with variations for different kinds of securities offenses and different circumstances that might toll the period of limitations. Both the bar and scholars * * * have pleaded, with a unanimity rare in the law, for help." *Norris*, 818 F.2d at 1332 (citation omitted). See also *ABA Report* at 654-655.[12]

All relevant factors thus point sharply in favor of a uniform federal rule. Indeed, that is the virtually unanimous conclusion reached by the commentators that have addressed the issue.[13]

---

[12] The uncertainty that necessarily results from reliance on state limitations rules is most vividly illustrated by two recent Fifth Circuit decisions in a single case. The court first held the plaintiffs' Section 10(b) claim time barred, applying the Texas statute of limitations for fraud actions. On rehearing, the court vacated its prior opinion because Texas had lengthened its fraud statute of limitations from two years to four years and the plaintiffs' claims were viable under the new limitations rule. *In re Sioux, Ltd., Securities Litigation*, 901 F.2d 51, 52-53, vacated, 914 F.2d 61, 63-64 (5th Cir. 1990).

[13] See, *e.g.*, *ABA Report* at 657-658; Loss, *supra*, at 995; Ruder, *Civil Liability Under Rule 10b-5: Judicial Revision of Legislative Intent?*, 57 Nw. U.L. Rev. 627, 649-650, 681 n.243 (1962) (the author was chairman of the SEC from 1987 to 1989); A. Bromberg, *Securities Law: Fraud: SEC Rule 10b-5* § 12.9, at 284 (1967); Israels, Book Review, 77 Yale L.J. 1585, 1591-1592 (1968); Block & Barton, *Statute of Limitations in Private Actions Under Section 10(b)—A Proposal for Achieving Uniformity*, 7 Sec. Reg. L.J. 374, 381-382 (1980); Bloomenthal, *Statutes of Limitations and the Securities Acts—Part II*, 7 Sec. & Fed. Corp. L. Rep. (Clark Boardman) 25, 25-26, 30 (Apr. 1985).

3. *The Causes Of Action Subject To The One Year/Three Year Rule Provide The Closest Analogy To Section 10(b) Claims.*

Every court of appeals to hold that a uniform federal statute of limitations should govern Section 10(b) actions has chosen the one year/three year rule. *Ceres Partners*, slip op. 7266-7274; *Short*, 908 F.2d at 1390-1392; *Data Access*, 843 F.2d at 1549. The other possibility, a rather recent entry, is part of a new express cause of action for insider trading that was added to the 1934 Act by the Insider Trading and Securities Fraud Enforcement Act of 1988 (ITSFEA). This new action, codified as Section 20A of the 1934 Act, 15 U.S.C. § 78t-1, imposes liability on "[a]ny person who violates any provision of this chapter or the rules or regulations thereunder by purchasing or selling a security while in possession of material, nonpublic information." 15 U.S.C. § 78t-1(a). Section 20A(b) limits this cause of action in several ways, and includes a statute of limitations providing that "[n]o action may be brought under this section more than 5 years after the date of the last transaction that is the subject of the violation." 15 U.S.C. § 78t-1(b)(4).

To begin with, it is highly questionable whether the new five year limitations period should even be considered as a possible statute of limitations for Section 10(b) actions. The five year rule was enacted 54 years after Section 10(b). Certainly, the 73rd Congress could not have contemplated application of that limitations rule. This distinguishes the present situation from *Malley-Duff*, where the Court applied the Clayton Act statute of limitations to RICO actions in part because RICO's legislative history indicated that Congress might have intended that result. 483 U.S. at 150-152. And in *DelCostello*, the federal limitations rule that the Court applied to the federal claims was enacted in the same statute as those causes of action. 462 U.S. at 169.

Giving consideration to any statute of limitations that happens to be in the United States Code on the day that

the question is presented to a court for decision, no matter what the date of that statute's adoption, leads to very anomalous results. For example, when the Third Circuit decided *Data Access*, Section 20A had not yet been enacted. Assuming that the court correctly concluded that a federal statute of limitations should apply to Section 10(b) actions, the one year/three year rule was the only provision available. What position would the Solicitor General have taken if the Court had invited the views of the United States in *Data Access*? Was that decision correct when rendered, but now erroneous due to the subsequent enactment of Section 20A?

Indeed, "[a]ny court choosing a federal statute of limitations between 1946 (the date of the first decision recognizing a private right of action under Rule 10b-5) and 1988 necessarily would have selected" the one year/three year rule. *Short*, 908 F.2d at 1390. What if five courts of appeals had reached that conclusion; would they all be required to reexamine their prior decisions on the ground that Section 20A is a better "fit"? And what if Congress in 1992 adds a new express cause of action to the securities laws with a two year/four year statute of limitations; will the lower courts—and eventually this Court—have to consider again which is the most appropriate limitations rule for Section 10(b)?

The possibilities are endless, but the point is obvious: an open-ended inquiry leads neither to certainty nor finality. A court always will have to reconsider, and possibly alter, its decision in the event a new federal statute of limitations is enacted.

" 'Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations.' " *Wilson*, 471 U.S. at 266 (quoting *Chardon* v. *Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting)). The Court may for that reason wish to limit the potential "candidates" to those limitations provisions already in existence on the date of

enactment of the statute giving rise to the cause of action and those limitations rules adopted concurrently with that statute. If Congress wishes to create a new statute of limitations for an already-existing cause of action, it would of course remain free to do so by legislation.

At the very least, the Court should view with extreme skepticism suggestions to apply federal statutes of limitations enacted long after the substantive provision in question. Especially where, as here, a clearly appropriate statute of limitations existed at the time Congress enacted the substantive statute, the Court should not expand the inquiry unnecessarily.

Assuming, *arguendo*, that Section 20A is eligible for consideration, the Court should nonetheless apply the one year/three year rule to Section 10(b) actions. The express causes of action that are limited by the one year/three year rule supply the "closest analog[ies]" to Section 10(b). *Malley-Duff*, 483 U.S. at 150.

First, Section 20A's five year limitations rule does not by its terms apply to Section 10(b) actions. Indeed, Congress intended that this provision *not* alter development of the law regarding Section 10(b). See 15 U.S.C. § 78t-1(d) ("[n]othing in this section shall be construed to limit or condition the right of any person to bring an action to enforce a requirement of this chapter or the availability of any cause of action implied from a provision of this chapter").

Second, Section 10(b) is much more analogous to the causes of action subject to the one year/three year rule than it is to Section 20A. We have already discussed the close similarities between these provisions with respect to the conduct prohibited, their parallel language, and their identical purpose. See pages 8-10, *supra*. To be sure, Section 20A resembles the other express causes of action under the securities laws in that it encompasses conduct that also is actionable under Section 10(b). But Section 20A "focuses only on insider trading. * * *

Th[e] section has no relationship to any of the many other types of claims that can be maintained under" Section 10(b). *Ceres Partners*, slip op. 7271. For example, allegations of express misrepresentations, omissions of material information, and other forms of fraud, which serve as the basis for the vast majority of the claims brought under Section 10(b)—and which are actionable under the express causes of action subject to the one year/three year rule—are not covered by Section 20A. Because it singles out only one "particular and atypical kind of violation" (*Short*, 908 F.2d at 1392), Section 20A's narrow focus contrasts sharply with the variety of claims that may be asserted under the other express actions and Section 10(b).

Moreover, Congress crafted Section 20A with reference to considerations unique to the insider trading context. The statute was "one of 'a variety of measures designed to provide greater deterrence, detection and punishment for violations of insider trading.' These measures were needed because of the difficulties of ferreting out evidence sufficient to prosecute insider trading cases." *Ceres Partners*, slip op. 7271 (quoting H.R. Rep. No. 910, 100th Cong., 2d Sess. 7 (1988)). Thus, the evolution of the five year statute of limitations makes clear that the provision represents Congress's judgment about the appropriate statute of limitations for *insider trading* offenses, not for other types of securities law violations.

The provision was drawn from the Insider Trading Sanctions Act of 1984, which authorizes the Securities and Exchange Commission to seek civil penalties against inside traders; this penalty authority is limited by a five year statute of limitations. See 15 U.S.C. § 78u-1 (d)(5).[14] Congress simply adopted the same five year

[14] That limitations period, in turn, was based on the statute of limitations for criminal prosecutions under the 1934 Act. *The Insider Trading Act of 1983: Hearing on H.R. 559 Before the Subcomm. on Securities of the House Comm. on Banking, Housing, and Urban Affairs*, 98th Cong., 2d Sess. 28 (1984) (statement of SEC Chairman Shad).

rule for the new private cause of action for insider trading created by Section 20A. *The Insider Trading Proscription Act of 1987: Hearing on S. 1380 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 100th Cong., 1st Sess. 30 (1987) (SEC proposed bill); see also *Definition of Insider Trading: Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 100th Cong., 1st Sess., pt. 1, at 40 (1987) (joint statement of Harvey L. Pitt and John F. Olson). The provision thus originated as a limitation on the general rule that the SEC's enforcement authority is not restricted by *any* statute of limitations. It would be peculiar indeed to borrow from a provision intended to *circumscribe* the SEC's authority in order to *expand* the rights of private litigants bringing claims that Congress did not even consider at the time it enacted the five year provision.

The one year/three year rule, by contrast, was specifically intended by Congress to serve as a *general* statute of limitations for *private* actions seeking recovery for violations of the securities laws. See pages 14-15, *supra*. It is "the statute *designed for* the kind of conduct about which * * * most * * * 10b-5 plaintiffs complain." *Short*, 908 F.2d at 1392 (emphasis in original). That generic judgment, rather than Congress's determination that "unique measures were necessary to curb insider trading," should apply to Section 10(b) actions. *Ceres Partners*, slip op. 7272. Indeed, because Congress in 1934 expressly rejected a five year limitations rule on the ground that it was too long (see page 14, *supra*), this Court should be especially reluctant to extend the Section 20A limitations provision beyond the insider trading context.[15]

[15] The policy judgments made by Congress in 1934—that one year leaves a plaintiff sufficient time to file a claim, that a statute of repose is necessary to ensure certainty in business affairs, and that longer time periods would encourage speculation by potential

Third, it is not clear whether the five year limitations period is a statute of repose, cutting off claims five years from the date of the underlying conduct, or whether the five year period is subject to equitable tolling. See *Short*, 908 F.2d at 1392. As we have discussed, "[s]etting an outer limit for claiming fraud or material omissions in the sale of securities is an important aspect of [the one year/three year rule], one of the principal reasons Congress designed the statute that way." *Ibid.* This uncertainty regarding the parameters of the five year rule weighs strongly against applying that rule to Section 10(b) claims. *Id.* at 1392.

Finally, the practicalities of litigation do not favor a different result. Section 20A is an *additional* remedy for insider trading; it does not supplant the remedy now provided by Section 10(b). Insider trading plaintiffs will presumably assert claims under both Section 10(b) and Section 20A, just as plaintiffs claiming injury from, for example, market manipulation, bring parallel claims under Sections 9 and 10(b). See, *e.g.*, *Schaefer* v. *First National Bank*, 509 F.2d 1287, 1292-1293 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976). And, because Section 20A and the other express causes of action are subject to different statutes of limitations, complete consistency is impossible: the limitations rule for Section 10(b) actions necessarily will be different from the rule governing some express action. That inconsistency will be minimized if Section 10(b) actions are subject to the

---

plaintiffs (see pages 11-13, *supra*)—remain valid today. As one court has observed, these considerations may weigh differently with respect to insider trading because the potential damages award "is fixed within days after the trading, sometimes within hours. * * * [N]o one can use delay in bringing suit to speculate on the firm's future prosperity." *Short*, 908 F.2d at 1392. The enactment of the five year period for insider trading actions accordingly does not undercut Congress's earlier judgment with respect to the generality of securities fraud actions.

rule applicable to most express actions—the one year/three year rule.

To be sure, a plaintiff whose claims are untimely under the one year/three year rule might try to characterize them as insider trading allegations in order to obtain the benefit of the longer statute of limitations. But Section 20A plainly has no application to the whole spectrum of Section 10(b) claims asserted against nontrading defendants. "In the great bulk of cases, there will be no ambiguity." *Short*, 908 F.2d at 1391. Moreover, Section 20A's less generous damages rule, which limits damages to the defendant's "profit gained or loss avoided" less any amount disgorged to the SEC (15 U.S.C. § 78t-1(b)(1) & (2)), provides a significant disincentive to such chicanery.

In sum, every relevant factor establishes that the one year/three year rule represents Congress's judgment concerning the appropriate limitations period for the broad spectrum of securities fraud encompassed by Section 10(b). This Court should hold that rule applicable to Section 10(b) actions.[16]

---

[16] Respondents stated in their brief in opposition (at 10) that in the event the Court granted certiorari, "whether the statute of limitations should be changed retroactively to bar respondents' fraud claims will be a major issue." Five Justices recently indicated that decisions in civil cases generally apply retroactively. See *American Trucking Ass'ns, Inc.* v. *Smith*, 110 S. Ct. 2323, 2347-2352 (1990) (Stevens, J., dissenting, joined by Brennan, Marshall, and Blackmun, JJ.); *id.* at 2343-2345 (Scalia, J., concurring in the judgment). Even if the retroactivity question turns on the factors identified by the Court in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), moreover, this Court can and should decide the statute of limitations issue on the merits before proceeding to the question of retroactivity. *Id.* at 100-105; cf. *United States* v. *Leon*, 468 U.S. 897, 924-925 (1984). Indeed, the Court may leave the question of retroactivity to be determined on remand.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

Of Counsel:

JON N. EKDAHL
General Counsel
Arthur Andersen & Co.
69 W. Washington Street
Chicago, Illinois 60602

HARRIS J. AMHOWITZ
General Counsel
Coopers & Lybrand
1251 Avenue of the Americas
New York, New York 10020

HOWARD J. KRONGARD
General Counsel
Deloitte & Touche
1633 Broadway
New York, New York 10019

CARL D. LIGGIO
General Counsel
Ernst & Young
380 Madison Avenue
New York, New York 10017

LEONARD P. NOVELLO
General Counsel
KPMG Peat Marwick
767 Fifth Avenue
New York, New York 10153

ELDON OLSON *
General Counsel
Price Waterhouse
1251 Avenue of the Americas
New York, New York 10020
(212) 819-4878

* *Counsel of Record*

December 5, 1990